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Supreme Court, U. S.
FILED

SEP 18 1978

MICHAEL ROBAX, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,
Appellants,
v.

WILEY L. BOLDEN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**SUPPLEMENTAL BRIEF
IN SUPPORT OF MOTION TO AFFIRM**

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Appellees submit this supplemental brief with regard to a new issue first raised by appellants' Opposition to Motion to Affirm: whether the dilution rule of *White v. Regester*, 412 U.S. 755 (1973), should be applied to city elections.

Whatever the merits of that question, it simply is not presented by the instant case. The decision of the Fifth Circuit rests, not on a finding of dilution in violation of *White*, but on a finding of intentional discrimination in violation of *Gomillion v. Lightfoot*, 364 U.S. 399 (1960). The nature of the opinion below was detailed in our Motion to Affirm, pp. 8-14, and appellants' in their Opposition do not dispute our characterization of the Fifth Circuit's decision. Accordingly even if this Court were to hold *White* inapplicable to city elections, that would not require or permit reversal of the decision below.

This new contention, moreover, was never raised by appellants in the extensive litigation in the District Court and Court of Appeals, and is not included in the Jurisdictional Statement. Although the meaning and application of *White* was repeatedly and exhaustively briefed below, at no time prior to the filing of their Opposition to Motion to Affirm did appellants contend that *White* should not be applied to city elections. In support of this new contention appellants offer regarding the role of elected city officials a variety of factual assertions which were not presented to or addressed by the courts below and on which the record in this case is silent. Since this issue is not a jurisdictional one, and since appellants failed to raise or preserve it below, it is not properly before this Court. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 278-81 (1977).

For the above reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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